United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 5, 2005

TO : Celeste Mattina, Regional Director
Region 2

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: National Lacrosse League
Case 2-CA-36675-1

530-6050-7000
530-6067-4000
530-8045-3725
530-8049

This case was submitted for advice as to: (1) whether the Board should assert jurisdiction in this dispute, which involves the National Lacrosse League (NLL) and its 10 teams, including two located in Canada; and (2) if so, whether the NLL violated Section 8(a)(1) and (5) of the Act by: (a) unilaterally implementing a dispersal draft of players from a disbanded Canadian franchise and/or (b) unilaterally promulgating a rule allowing each NLL club to require its players to participate in as many as three exhibition games annually without compensation.

We conclude that complaint should issue, absent settlement, as to both allegations. We view the key issue in this case as not whether to assert jurisdiction over the NLL, but rather whether the NLL must bargain over a dispersal draft of only non-unit Canadian players. We conclude that it must because the dispersal draft, albeit of non-unit employees, "vitally affected" unit employees and is thus a mandatory subject of bargaining. We further conclude that the NLL violated Section 8(a)(5) and (1) by unilaterally implementing work rules regarding pre-season exhibition games.

FACTS

Background Facts

The NLL has operated a professional indoor lacrosse league in the United States and Canada for approximately 12 years. The NLL headquarters is in New York City. The NLL currently comprises 10 teams, two of which are located in Canadian cities (Toronto and Calgary). The League recently lost a Canadian team (the Vancouver Ravens) when it disbanded. The ex-players of that team are the players involved in the "dispersal draft" discussed herein. Each NLL team is a franchise owned and operated by a discrete individual or group. Most NLL players have other full-time

day jobs that do not interfere with weekend lacrosse competition and travel.

In 1993, the Union was certified as the collective-bargaining representative of all "roster players"[1] employed by the "Employer or its lacrosse teams." The certification names the NLL as the Employer. When certification issued, the NLL included no Canadian teams.

The parties' most recent collective-bargaining agreement was effective by its terms from August 2000 through July 31, 2003. Thereafter, in December 2003, the parties agreed to a one-year extension of the contract. The parties continued contract negotiations during and after this extension period. Although the parties disagree about what has been agreed upon to date, it is undisputed that there is no new executed contract. The NLL contends that on October 2, 2004, the parties agreed "in principle" to a new three-year agreement, effective through the 2006-2007 season. The Union contends that the parties agreed only on salary-related issues and planned to reach final agreement on other terms by June 1, 2005.[2]

The Union filed the instant charge in December 2004. As amended in January 2005, it alleges that the NLL violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a dispersal draft and by unilaterally establishing a rule that may require players to participate in as many as three exhibition games annually without compensation.

Dispersal Draft

At about 10 p.m. on December 14, 2004, the NLL Deputy Commissioner and General Counsel, George Daniel, sent the Union a fax stating that the Vancouver Ravens franchise had disbanded operations, and that a dispersal draft of Ravens players would be conducted the next day at 6 p.m. Daniel indicated that the NLL would use the dispersal draft rules that had been unilaterally imposed in 2002 following the parties' failure to agree upon terms of a dispersal draft involving the former players of the disbanded Montreal

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[1] The roster for each club consists of 17 "dressing players," 6 "non-dressing players," and up to 3 "practice players."

[2] According to the Union, if the parties missed this deadline, the October extension memo would apply for the next two seasons (through the 2006-2007 season).

Express team.[3] Daniel noted that the NLL reserved the right to conduct the draft in accordance with the management-rights clause of the contract. The memo then set forth the dispersal draft rules, which included the order of team selection in each of the two rounds of the draft, various rules relating to player hardship and player movement, and a detailed status report on each of the former Vancouver players eligible to participate in the draft.

The Union first saw Daniel's fax the next morning (December 15). Later that day, at about 12:21 p.m., Daniel sent the Union an e-mail stating that because the Union had never sought to rescind the Montreal dispersal draft, and since no party had proposed contract provisions dealing with closure during the subsequent negotiations for a successor contract, the NLL would use the system used for the Montreal dispersal draft. The e-mail noted that while the NLL remained "ready, willing and able to consider any proposals the Union may have on the subject," the draft would be held that afternoon as scheduled due to the "limited amount of time remaining before the start of the season [January 1] and the significant amount of arrangements [that] must be made by both players and coaches."

The Union replied a few hours later, at 4:19 p.m., stating that the Vancouver dispersal draft and all terms and conditions incident to it were mandatory subjects of bargaining and that the Union would seek rescission of the draft if it was implemented without negotiations.

Despite the Union's protest, the NLL proceeded with the draft. The draft resulted in the remaining 10 teams selecting 16 former Vancouver players. And, consistent with the draft rules announced by the NLL on December 14, approximately 16 players from the 10 remaining teams were released by those teams to make room for the drafted players.

The NLL contends that because the parties had no agreement on the subject, it was free to use the 2002 system because it stands as a past practice. It also argues that exigent circumstances precluded the opportunity to bargain over a new system. Alternatively, the NLL contends that the contractual management-rights clause privileged it to implement the dispersal draft. Specifically, the management-rights clause states, in part, that the exclusive

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[3] The expired contract did not address a dispersal draft system, nor did any of the parties' subsequent bargaining proposals.

rights of the League and the Clubs include the right to "develop the method for assigning or transferring or trading Players to or between Clubs."

The Union asserts that one unilaterally implemented dispersal draft does not establish a past practice, and that each dispersal draft is a discrete event with its own set of circumstances. It further contends that there was plenty of time to meet and negotiate a new set of rules, especially given the parties' bargaining history of quickly resolving time-sensitive issues. With regard to the NLL's management-rights argument, the Union contends that a dispersal draft is a unique situation, different from a mere "assignment or transfer" to a different team, as evidenced by the fact that the NLL negotiated with the Union over the subject when the Montreal team disbanded in 2002.

Exhibition Games

During negotiations for a successor contract, the parties discussed and exchanged proposals on the issue of player compensation for exhibition games. They discussed various compensation possibilities, including some "free" exhibition games where admission would not be charged and players would not be paid. For example, on May 5, 2004, the NLL proposed that each club would participate in two exhibition games where admission would be charged and players would be paid 50% of gross revenues less expenses, but that all pre-season games where no admission fees are charged would be deemed "scrimmages" without player compensation.

On November 11, 2004, the Union submitted a new proposal to the NLL regarding exhibition games for the 2004-2005 season. The proposal stated that each club could have a maximum of three exhibition games, and that players would receive $350 per game, but noted that the Union would allow clubs "the ability to have some free exhibition games next year in exchange for unrestricted free agency that would allow a player aged 34 or older with a minimum of 8 years of lacrosse experience the opportunity to play for any club at the end of his contract term."

In a reply e-mail on November 12, 2004, the NLL set forth its "position" on exhibition games, effectively implementing elements of its prior bargaining proposals about these games. The NLL stated that terms for games where admission fees are charged had been and would continue to be negotiated on a case-by-case basis. The e-mail also stated:

> With respect to games or scrimmages that are free to the public, the NLL's position is that the players are not entitled to compensation. The long-standing past practice of the parties supports the NLL's position and is the controlling authority in this matter since the collective bargaining agreement is silent on the subject. The past practice of the parties is that Union consent for "free" games was neither sought nor given.

The e-mail also stated that on October 20, 2004, the NLL's Board of Governors voted to limit exhibition games and scrimmages to a maximum of three per team, except for expansion teams, which would be permitted to play four. The NLL noted that it would count any "free" scrimmage or game as a training camp session, and that it would "deem any player refusing to participate in a scrimmage or game where no admission is charged as willfully failing to attend a training camp session and potentially in breach of contract based on the clear past practice of the parties."

The NLL contends that its November 12 e-mail was not a unilateral change because it was consistent with the past practice of not compensating players for free-admission games. The Union, on the other hand, contends that the established past practice was to negotiate the issue of player compensation for *all* preseason games, including non-admission-fee exhibition games, on a case-by-case basis with the clubs involved. Although it was unable to provide any examples of players who have been paid for participating in free-admission games, the Union noted that it has always retained the option of demanding payment for such games.[4] Moreover, the Union contends that in the past, if the parties were unable to reach agreement over the terms of a free-admission exhibition game, the game was simply not held and no disciplinary action was taken against any player. It argues that the NLL's declaration that players are not

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[4] According to the Union, if the event is a scrimmage or exhibition game played for charity, or for educational purposes in a small venue, the players are generally willing to play without compensation because such an event presents an opportunity to promote interest in the game and no-one is profiting. However, the Union desires to retain the option of negotiating player compensation for certain free-admission games, such as those held in a large arena, where the NLL and its franchises will benefit from the sale of souvenirs, parking, and food and drink concessions, as well as from the promotional value of appearing before a large group.

entitled to compensation for playing in free games, in conjunction with the limit on games and the threat of discipline for non-participation, means that players could be required to play without compensation in as many as three games (four per expansion club) each season.

ACTION

1. The Dispersal Draft

The Region submitted this case in part on the issue of whether to assert jurisdiction in this dispute, particularly with respect to the dispersal draft allegation. The jurisdictional component of that issue arises because the draft pertains to the dispersal of only Canadian players. We note that the Board previously asserted jurisdiction over the NLL as an employer in 1993, but the League then had no Canadian teams. If the NLL had included these Canadian teams in 1993, the Board would have excluded them from the certification.[5] The players on the Canadian teams are thus not bargaining unit employees under the NLRA, even though the parties treated them as such and applied the collective-bargaining agreements to them. We note that the teams share control over essential terms and conditions of employment of the players and thus are joint employers with the NLL.[6] On the other hand, the instant charge is filed against only the NLL, which is a U.S. corporation and a Section 2(2) employer of the bargaining unit players.

We therefore view the key issue in this case as not whether to assert jurisdiction over the NLL, but rather whether the NLL must bargain over a dispersal draft of only non-unit Canadian players. We conclude that it must because the dispersal draft, albeit of non-unit employees, vitally affects unit employees and is thus a mandatory subject of bargaining.

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[5] See North American Soccer League, 236 NLRB 1317, 1319 (1978) (Board declined to assert jurisdiction over two Canadian soccer teams found to be joint employers with the league, relying on the following factors: that the teams were owned and operated solely by Canadian residents; that their business dealings, such as the location of offices and payment of license fees and taxes, were conducted exclusively in Canada; and that the teams were affiliated with the Canadian rather than the U.S. soccer federation.)

[6] See, e.g., North American Soccer League, 236 NLRB at 1319 (individual clubs and soccer league jointly controlled the terms and conditions of employment of the players).

An employer violates Section 8(a)(5) of the Act if it unilaterally changes terms and conditions of employment without bargaining in good faith with the union that represents its employees.[7] It is well established that an employer has no obligation to bargain about matters concerning individuals outside the bargaining unit unless those matters "vitally affect" the terms and conditions of employment of unit employees.[8] The Board has held that an indirect or incidental impact on unit employees is not sufficient to establish a matter as a mandatory subject.[9] Rather, mandatory subjects include only those matters that "materially or significantly" affect unit employees' terms and conditions of employment.[10]

A dispersal draft is one element of a reserve system, by which the right to a player's services becomes the property of a particular club with limited freedom for the player to seek employment with another club.[11] Reserve systems are generally designed to determine revenue sharing and player movement, and to spread talent in order to maintain competitive balance among teams.[12] Courts in anti-trust cases have consistently held that the constituent parts of reserve and free agency systems are mandatory subjects of bargaining.[13] Sports leagues and players'

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[7] NLRB v. Katz, 369 U.S. 736 (1962).

[8] Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971); United Technologies Corp., 274 NLRB 1069, 1070 (1985), enfd. 789 F.2d 121 (2nd Cir. 1986).

[9] Id. at 180-182 (discontinuation of medical benefits for retirees did not "vitally affect" unit employees because "benefits that active workers may reap by including retired employees under the same health insurance contract" were "speculative and insubstantial at best").

[10] See, e.g., United Technologies Corp., 274 NLRB at 1070, citing Seattle First National Bank v. NLRB, 444 F.2d 30 (9th cir. 1971).

[11] See Silverman v. Major League Baseball Player Relations Committee, Inc., 67 F.3d 1054, 1061 (1995).

[12] Id.

[13] In the anti-trust context, the component parts of reserve systems in professional sports are protected from antitrust attack because they are mandatory subjects of bargaining within the meaning of Section 8(d) of the Act. See, e.g.,

unions use a mix of free agency and reserve clauses to set individual salaries. The various reserve system and free agency provisions used in a particular sport are properly considered together, rather than individually, in determining whether they are mandatory subjects of bargaining.[14]

The dispersal draft here clearly is a mandatory subject under the rationale of the above cases.[15] Moreover, the effect of the dispersal draft on the terms and conditions of employment of the bargaining unit players in this case is not merely theoretical. For example, one of the unilaterally implemented dispersal draft rules provided that "[a]ny club selecting a player in the dispersal draft shall immediately release a player from its active roster." As a result of the dispersal draft, 16 players were released from their respective teams. Thus the dispersal draft clearly affected the job security of bargaining unit players.[16]

Wood v. National Basketball Association, 809 F.2d 954 (2nd Cir. 1987) (NBA reserve system involving college draft, salary cap, revenue sharing, and free agency with a right of first refusal was a mandatory subject of bargaining); Mackey v. National Football League, 543 F.2d 606, 615 (8th Cir. 1976) ("Rozelle rule," which requires inter-team compensation when a player's contractual obligation to one team expires and he is signed by another team, was a mandatory subject of bargaining since it "operate[d] to restrict a free agent's ability to move from one team to another and depresse[d] player salaries."); McCourt v. California Sports, Inc., 600 F.2d 1193, 1194-1195, 1198 (6th Cir. 1979) (reserve system in professional hockey and modified Rozelle rule found to be a mandatory subject of bargaining); Powell v. National Football League, 930 F.2d 1293, 1298-1299 (8th Cir. 1989) (right of first refusal provision); NBA v. Williams, 45 F.3d 684 (2nd Cir. 1995) (college draft, right of first refusal, and revenue sharing/salary cap).

[14] See, e.g., Silverman v. Major League Baseball Player Relations Committee, 67 F.3d at 1061-1062 (Court noted that to hold that any of the various free agency and reserve clauses that "make up the mix" in a particular sport is a permissive subject of bargaining "would ignore the reality of collective bargaining in sports").

[15] See in particular NBA v. Williams, supra, finding a college draft to be mandatory.

[16] Compare United Technologies, 274 NLRB at 1070 (in finding summer help program not a mandatory subject, Board noted that unit employees were not laid off, denied recall from

We thus conclude that the dispersal draft was a mandatory subject of bargaining.

We agree with the Region that the terms from the 2002 Montreal dispersal draft did not constitute a binding past practice. As noted by the Union, one unilaterally implemented dispersal draft does not establish a past practice. Also, there is no indication that the parties intended the terms of the 2002 Montreal dispersal draft to govern anything beyond the dispersal of the particular team involved. In this regard, the 2002 rules were very specific -- even discussing the treatment and draft eligibility of the individual Montreal players. This conclusion is also consistent with the Employer's stated willingness to consider any Union proposals on the subject up until the time of the draft.

We also reject the NLL's argument that the Union clearly and unmistakably waived its right to bargain over the dispersal draft by agreeing to the contractual management-rights clause. As noted by the Region, a management-rights clause does not survive the expiration of a contract.[17] The parties clearly had not reached final agreement on a new contract prior to the dispersal draft, and thus no management-rights clause was in effect.

We further conclude that there were no exigent circumstances that would excuse the NLL from bargaining over the draft. The NLL had been aware for some time that the Vancouver team was having financial difficulty, and thus could have foreseen the possibility that the team would be disbanded. Even assuming that the NLL was not aware before December 18, 2004 that the Vancouver franchise would be disbanded, more than two weeks still remained before the start of the season. Thus we believe there was sufficient time for expedited bargaining, especially given the limited scope of the matter to be negotiated and the parties' history of quickly resolving time-sensitive issues.

Accordingly, we conclude that the NLL violated Section 8(a)(5) by unilaterally implementing the dispersal draft.

2. Exhibition Games

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layoff, or denied overtime opportunities because of program).

[17] See, e.g., Holiday Inn of Victorville, 284 NLRB 916 (1987).

The NLL contends that its November 12 e-mail regarding exhibition games was not a unilateral change because it was consistent with the past practice of not compensating players for free-admission games. The evidence shows, however, that the parties did not have a single, consistent past practice for all free-admission games. Rather, whenever the NLL would propose an exhibition game or series of exhibition games, including free-admission games, the parties would bargain on a case-by-case basis about player compensation, including travel arrangements, hotel expenses, and per diem payments. We conclude, therefore, that the NLL's November 12 exhibition-game rule constituted an unlawful unilateral change in player compensation.

The November 12 e-mail was also an unlawful unilateral change concerning both the limit on the number of pre-season games and the treatment of players who refuse to participate in free-admission games. Prior to November 12, the parties clearly had no limit on the number of preseason games that could be played, and no player had ever been disciplined for refusing to participate in a free-admission exhibition game.

Conclusion

For the above reasons, complaint should issue, absent settlement, alleging that the NLL violated Section 8(a)(5) and (1) by refusing to bargain over the dispersal draft and by unilaterally implementing work rules regarding player compensation for, and participation in, pre-season games.

B.J.K.